

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

74-2644-45

**United States Court of Appeals
For the Second Circuit**

DOCKET No. 74-2644

In the Matter of the Petition for
Limitation of Liability

of

MARINE SULPHUR TRANSPORT CORPORATION,
As Owner,

and

MARINE TRANSPORT LINES, INC.,
As Demise Charterer,

of the Vessel MARINE SULPHUR QUEEN,
Petitioners-Appellees and Appellants,

HALGA WATSON, as widow and Executrix of the Estate of
George Watson, deceased,
Claimant-Appellant and Appellee.

DOCKET No. 74-2645

HALGA WATSON, as widow and Executrix of the Estate of
George Watson, deceased,
Plaintiff-Appellant and Appellee,

against

MARINE SULPHUR TRANSPORT CORP. and
MARINE TRANSPORT LINES, INC.,
Defendants-Appellees and Appellants.

ON CROSS APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR
APPELLEES-CROSS-APPELLANTS**

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of

As Owner, :

Docket No. 74-
2644

As Demise Charterer, :

Petitioners-Appellees :
and Appellants, :

Claimant-Appellant and :
Appellee. :

Plaintiff-Appellant and
Appellee,

Docket No. 74-
2645

Defendants-Appellees :
and Appellants. :

REPLY BRIEF FOR APPELLEES-CROSS-APPELLANTS

Statement

This reply brief on behalf of the Defendants will necessarily refer only to those portions of the reply brief of the Plaintiff which discuss the contentions that were put forward by the Defendants at pages 25 to 31 of their main brief in support of their cross appeal. In that connection, consideration will be given to (a) so much of the argument at pages 16 to 19 of the Plaintiff's reply brief as relates to the 6% annual increase factor used by the Court below in the calculation of future earnings and (b) all of the arguments on the subject of prejudgment interest put forward at pages 20 to 24 of the Plaintiff's reply brief. However, we shall not discuss the Plaintiff's contentions in that order but rather in the order in which we put forward our own arguments at pages 25 to 31 of our main brief.

The Allowance of Prejudgment Interest

The statement made in the first sentence on page 20 of the Plaintiff's reply brief, to the effect that the Defendants never "urged" the District Court that prejudgment interest could not be awarded, is incorrect.

At page 4 of Defendants' main brief below, following the trial of the issue of damages, they pointed out

to the District Court that authority did exist, in the form of the decision in Petition of United States Steel Corporation, 436 F. 2d 1256, 1277 (6th Cir. 1970), cited in our main brief here (pp. 26-7), for a holding that no prejudgment interest is allowable in death cases. In view of the fact, noted on the very next page (p. 5) of the Defendants' main brief below, that the District Court had already indicated that prejudgment interest would be allowed, the Defendants did not belabor the point. They simply raised the question of whether or not prejudgment interest should be allowed at all, cited the United States Steel case, and went on to present arguments for limiting any period for which, and the rate at which the District Court would allow the prejudgment interest the Court had indicated it was disposed to award.

If the Plaintiff meant to say that the Defendants did not present an argument to the District Court that the Plaintiff's insistence on proceeding to trial on the damage issue on the civil side deprived her of the right to prejudgment interest, that is correct. The argument advanced and the cases cited in the second full paragraph on page 26 of our main brief here were not presented to the District Court. But that particular point presents a pure question of law for consideration by this Court.

The entire discussion by the Plaintiff (Reply Br. p. 20) with respect to whether or not the question of liability was decided on the basis of a claim of unseaworthiness or a claim of negligence not only overlooks the fact that a claim of unseaworthiness when combined, as it was here, with a claim under the Jones Act can be tried on the civil side to a jury but also overlooks the fact that we are here concerned with the procedure followed in the trial of the damage issue rather than the earlier trial of the liability issue. The question here is not the particular basis on which the liability issue was decided. Instead, the question is whether the Plaintiff sought a trial of the issue of damages on the civil side and persisted in claiming a right to a jury trial. She did, waiving her jury demand only at the start of the trial (J.A. 7a-9a, 281a), and pre-judgment interest should accordingly have been denied on the basis of all of the decisions on that point cited on page 26 of our main brief here.

Interest Rate

Our discussion of the above subject at page 28 of our main brief was inadequate in not taking account of the decision in Petition of City of New York, 332 F. 2d 1006, 1008, 1009 (2d Cir. 1964), cert. den. 379 U. S. 922 (1964), in which this Court unquestionably approved the use of a 6% rate of interest as not being an abuse of discretion

on the part of the District Court in that case.

However, the record in the instant case does not justify the allowance of so high a rate. Having in mind that the period for which prejudgment interest was allowed in this case ran from February of 1963 to the date of decision on July 31, 1974, it should be noted that the testimony of the Plaintiff's own expert, Dr. Ornati, found at page 182 of the transcript of his direct examination (not reproduced in the Joint Appendix), was that interest rates, even on the compound basis used by banks, did not rise to that level in that period. He testified that four periods should be considered with respect to the movement of interest rates and that, with particular reference to three of those four periods, the compound rate of interest paid on savings by banks was (a) between 4-1/4% and 4-1/2% from the beginning of 1963 to October, 1966, (b) between 5% and 5-1/4% from October, 1966 to February, 1970 and (c) an average of 5-1/2% from February, 1970 to July, 1973. For the fourth period, he said that a "proper rate" from July, 1973 to the date of the trial at the end of 1973 was between 5-3/4% to 5-7/8%.

In view of this, the District Court's allowance of an interest rate of 6% for the period from February, 1963 to July 31, 1974 was not a proper exercise of discre-

tion in this case.

Period for Which Interest Was Allowed

With respect to Plaintiff's claim (Reply Br. pp. 20, 21) that the Defendants "urged" the District Court to allow prejudgment interest for the entire period from the date of death in February, 1963 to the July 31, 1974 date of decision, the Plaintiff has disregarded the fact that, in both the main and reply briefs of the Defendants in the District Court, the decision in Venore Transportation Company v. Oswego Shipping Corporation, 363 F. Supp. 1366 (S.D.N.Y. 1973), aff'd 498 F. 2d 469 (2d Cir. 1974), cited at page 26 of our main brief here, was cited to the District Court on the point that, even if prejudgment interest were to be allowed, it should not be allowed for the entire period stated above in view of the delays on the part of the Plaintiff. This is the same argument pressed here for consideration if this Court should feel that prejudgment interest ought to be allowed for some period.

Plaintiff has conceded (Reply Br. p. 22) that her extensive pre-trial discovery was the occasion of the delay from the February, 1963 date of the loss to the start of the trial in June, 1969. Six years and then some is an inordinate period of time for Plaintiff's pre-trial discovery, and interest should not have been allowed for that entire period.

Use of Compound Rather Than Simple Interest

On this subject, Plaintiff would have it (Reply Br. pp. 20,23) that Defendants "urged" and "submitted" that the District Court should use compound interest. Once again, the Plaintiff is incorrect. The Defendants addressed no such argument to the District Court. They did include in their main brief below an illustrative tabulation that incorrectly used a compound interest factor, an error that was also made in the tabulations proffered by the experts for both sides. That error was corrected in Defendants' final brief in the District Court which made the argument and cited the cases found on page 30 of our main brief here.

At page 23 of her Reply Brief here, the Plaintiff talks about uncontradicted expert testimony on both sides on the propriety of using compound interest. We have searched the record in the light of that comment and, apart from the tabulations the experts made that, as noted above, incorrectly used compound interest, we have found no support for that statement.

Finally, with respect to this question of using compound instead of simple interest, we note that, at page 23 of her Reply Brief, the Plaintiff has incorrectly cited the decision in Moore-McCormack Lines v. Richardson,

295 F. 2d 583, 593 (2d Cir. 1961), as though it supports her contention that compound interest is proper. The fact is that this Court, in its decision in that case, demonstrated that the interest under discussion was not compound interest but simple interest (Footnote 16, p. 594 of 295 F. 2d). The District Court should not have used compound interest in view of the decisions cited at page 30 of our main brief.

The Use of a 6% Annual Increase Factor
in the Calculation of Future Earnings

Our point as to the impropriety of the use of this factor is touched on by the Plaintiff at pages 16 to 19 of her Reply Brief where she also puts forward an argument on a point raised on her appeal rather than our cross appeal.

At no place in that discussion has the Plaintiff seen fit to address herself directly to the argument we made at pages 30 to 31 of our main brief. Similarly, the Plaintiff has studiously avoided any mention of Hoffman v. Sterling Drug Company, Inc., 485 F. 2d 132 (3rd Cir. 1973), the case cited by us as authority for our argument as to the unduly speculative nature of the use by the District Court of the 6% annual increase factor in calculating future earnings. The cases cited by the Plaintiff (Reply Br. p. 18) limit consideration to reasonable probabilities and

are not in conflict with the Hoffman teaching that a 6% rate involves unwarranted speculation.

The District Court here should not have engaged in the undue speculation involved in the use of a 6% rate of increase for future earnings.

Conclusion

The decision below should be affirmed, so far as the main appeal is concerned, but should be reversed with respect to the errors listed above by the cross-appellants.

Dated: New York, N. Y.
April 30, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

The undersigned being duly sworn, deposes and says:

I am over the age of eighteen years, and on the 29th day of April, 1975, I served two true copies of the within material on the addressee listed below by depositing such copies, enclosed in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department, in the Borough of Manhattan, City and State of New York, addressed as follows:

Schwartz & O'Connell, Esqs.
243 Waverly Place
New York, New York

Kathleen Wagner

Sworn to before me this
29th day of April, 1975.

Edward J. O'Neil

Notary Public, State of New York
No. 03-6219603 Qual. in Bronx Co.
Certificate filed in New York County
Term Expires March 30, 1976

